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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ARNOLD, Defendant and Appellant.	B303619 (Los Angeles County Super. Ct. No. BA037726)

APPEAL from an order of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Reversed and remanded with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Charles S. Lee and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In 1992, a jury found defendant and appellant Anthony Arnold guilty of second degree murder. (Pen. Code, § 187.)[1] The jury also found the personal use of knife allegation to be not true (§ 12022, subd. (b)). He was sentenced to 15 years to life in state prison. Defendant appealed his conviction, and on October 29, 1993, we affirmed the judgment. (*People v. Arnold* (Oct. 29, 1993), B065831 [nonpub. opn.], p. 13 (*Arnold I*).)

On January 28, 2019, defendant filed a petition for resentencing pursuant to section 1170.95. Following a hearing, the trial court denied the petition on the grounds that defendant was ineligible for resentencing relief because he was the actual killer.

Defendant timely filed a notice of appeal. He argues, inter alia, that the trial court erred in denying his petition for resentencing because it had not been conclusively established that he was the actual killer. The People agree.

In accordance with the parties' briefs, we reverse and remand the matter for the trial court to issue an order to show cause and to hold an evidentiary hearing pursuant to section 1170.95, subdivision (d).

FACTUAL BACKGROUND

"At 3 a.m. on July 8, 1990, Kathryn Cox was awakened by yelling outside her apartment on Adams and Magnolia Avenues in Los Angeles. Unable to see anything from her bedroom window, she went to the front door and stepped out to the porch. Later, she went to the end of the walkway. She saw a group of about 12 young men and women chasing Leonides Marroquin

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Carranza. They caught the victim in a vacant parking lot directly across from her apartment. About five men had the victim by a tree and were hitting him. He got free and ran, but he was chased and caught by appellant. Appellant hit the victim in the stomach several times. Ms. Cox demonstrated how appellant struck the victim, and the prosecutor described her movement as 'a closed fist with a horizontal motion, parallel to the ground in a[n] inward-type motion, with the thumb side of the fist moving towards the body.' The victim fell, and while he was lying on his back, appellant again hit him two or three times. The witness's demonstration of the way in which appellant struck the victim at that point was described as 'the same type of motion . . . only in a downward direction.' She also stated that she saw appellant hit the victim in a punching motion, with the 'fist in a forward direction.' Ms. Cox, who by this time was standing on the sidewalk outside her apartment house about 45 feet from the crime scene, did not see anything in appellant's hand. She heard sirens and then she heard someone say, 'Vamanos, Spider,' at which point appellant ran away.

"Ms. Cox walked across the street and saw that the victim had been stabbed several times in the abdomen. She testified that there was a lot of blood.

"Ms. Cox was wearing glasses on the witness stand, which she testified were for reading and not for distance.

"The victim died of multiple stab wounds. In addition to 13 stab wounds, the victim had abrasions on his face and forehead as well as defensive wounds on his hands.

"Bianca Alvarez, a friend of appellant's, testified that his nickname was Spider and that he belonged to a gang named 'Harpies.' She also testified that on the night of the murder, the

victim, who was drunk, walked up Magnolia and passed remarks to the group. One of the group suggested that they take the victim's wallet. About five of the males in the group, including appellant, started following the victim; and after they caught up with him, they started pushing him as they stood in a circle around him. However, Alvarez left at that point and returned only after everyone was running from the area and the victim had been stabbed.

"Appellant told Los Angeles Police Department Detective Eric Browne that his nickname was Spider. Appellant had a spider tattoo on his right upper arm, which he showed to the members of the jury." (*Arnold I*, *supra*, B065831, at pp. 2–4.)

PROCEDURAL BACKGROUND

I. *Defendant's section 1170.95 petition*

On January 28, 2019, defendant, in propria persona, filed a petition to be resentenced pursuant to section 1170.95. He averred that an information was filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; he was convicted of second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine; and he could not now be convicted of murder because of changes made to sections 188 and 189, effective January 1, 2019.

The People opposed the petition, arguing that section 1170.95 is unconstitutional and that defendant is not entitled to relief because (1) he was convicted of second degree murder as the actual killer, and (2) he was not convicted under the felony murder rule or the natural and probable consequences doctrine

Defendant, now represented by counsel, filed a reply brief, arguing that section 1170.95 is constitutional and that he did set

forth a prima facie case for relief. Thus, he requested that the trial court set a hearing to determine whether to vacate his murder conviction and resentence him.

In addition, in response to defendant's reply brief, the People and defendant, through counsel, submitted opposing supplemental briefs.

II. *Trial court's order denying defendant's petition*

After entertaining oral argument, the trial court denied defendant's petition. The minute order provides: "The petition is denied because the petitioner is not entitled to relief as a matter of law. [¶] The petitioner was convicted of 2nd degree murder. However, a review of the portions of the court file and appellate record available to this court reveal that the petitioner was the actual killer."

DISCUSSION

I. *Standard of Review*

We review the trial court's order de novo. (See *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1018 [application of law to undisputed facts]; *Stennett v. Miller* (2019) 34 Cal.App.5th 284, 290–291 [statutory interpretation].)

II. *Relevant Law*

Section 1170.95 provides a mechanism whereby people "who believe they were convicted of murder for an act that no longer qualifies as murder following the crime's redefinition in 2019[] may seek vacatur of their murder conviction and resentencing by filing a petition in the trial court." (*People v. Drayton* (2020) 47 Cal.App.5th 965, 973 (*Drayton*).)

In order to obtain Senate Bill Number 1437 resentencing relief, the petitioner must proceed sequentially through section 1170.95's separate steps. (*People v. Lewis* (2020) 43 Cal.App.5th

1128, 1140 (*Lewis*), review granted Mar. 18, 2020, S260598; see also *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1477 [sequential structure of a statutory scheme supports interpretation that acts required by the statutes occur in the same sequence].) First, a defendant must file a facially sufficient section 1170.95 petition. The petitioner must aver that he is eligible for relief because (1) an accusatory pleading was filed against him allowing the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) he was convicted of first or second degree murder; and (3) he could not be convicted of murder as a result of the recent amendments to sections 188 and 189. (§ 1170.95, subds. (a)(1)-(3), (b)(1)(A).)

The trial court must immediately review the petition and, if the petitioner is ineligible for resentencing as a matter of law because of some disqualifying factor, the trial court must dismiss or deny the petition. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328–333 (*Verdugo*), review granted Mar. 18, 2020, S260493; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57–58 (*Cornelius*), review granted Mar. 18, 2020, S260410; *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.)[2]

However, if the petition is facially sufficient, the petitioner is entitled to the appointment of counsel, if requested, and the People may then brief the question of whether the petitioner is

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[2] Disqualifying factors, or factors indicating ineligibility, include, for example, a petitioner who admitted to being the actual killer (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329–330) or a petitioner that the jury found was the actual killer (*Cornelius*, *supra*, 44 Cal.App.5th at p. 58).

entitled to relief. (§ 1170.95, subd. (c); *Lewis*, *supra*, 43 Cal.App.5th at pp. 1139–1140; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 331–332.) In contrast to the first step showing, the trial court makes the second step determination with the benefit of briefing and analysis by both parties, thereby permitting the trial court to undertake more informed analysis concerning a petitioner's "entitle[ment] to relief," relief meaning an evidentiary hearing, not necessarily entitlement to resentencing. (§ 1170.95, subd. (c); *Drayton*, *supra*, 47 Cal.App.5th at p. 975.)[3] When making this determination, "the trial court should assume all facts stated in the section 1170.95 petition are true. [Citation.] The trial court should not evaluate the credibility of the petition's assertions, but it need not credit factual assertions that are untrue as a matter of law . . . . [I]f the record 'contain[s] facts refuting the allegations made in the petition . . . the court is justified in making a credibility determination adverse to the petitioner.' [Citation.] However, this authority to make determinations without conducting an evidentiary hearing . . . is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime)." (*Drayton*, *supra*, at p. 980; see also *Lewis*, *supra*, 43 Cal.App.5th at p. 1138 [the contents of the

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[3] Although the same type of information from the record of conviction could result in denial of a petition at either prima facie step, the two steps are procedurally distinct and should not be read as a redundancy written into the statute. The statute contemplates two separate determinations that the trial court must make at different times during the petition procedure. (*Verdugo*, *supra*, 44 Cal.App.4th at pp. 328–329.)

record of conviction defeats a petitioner's prima facie showing only when the record "show[s] as a matter of law that the petitioner is not eligible for relief"].)

If the trial court determines that the petitioner has made a prima facie showing of entitlement to relief, it must issue an order to show cause. (§ 1170.95, subd. (c).) "[U]nless the parties waive the hearing or the petitioner's entitlement to relief is established as a matter of law by the record[,]" the trial court then holds a hearing at which "the burden of proof . . . shift[s] to the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (*Drayton*, *supra*, 47 Cal.App.5th at p. 981; see also § 1170.95, subd. (d)(1)-(3).)

III. *Defendant is entitled to an order to show cause hearing*

As the parties agree, defendant made a prima facie showing of eligibility. After all, he filed a section 1170.95 petition averring that (1) an information had been filed against him allowing the prosecution to proceed under a theory of murder under the felony murder rule or the natural and probable consequences doctrine; (2) he was convicted of second degree murder; and (3) he could not now be convicted of murder following the amendments to sections 188 and 189. And, after an examination of the record and briefing by both parties, there was no evidence to indisputably show that, as a matter of law, defendant was ineligible or not entitled to relief.

Because defendant satisfied the prima facie stages of section 1170.95, subdivision (c), the trial court was required to set the matter for an order to show cause, with an evidentiary hearing.

The trial court denied defendant's petition on the grounds that defendant was the actual killer. But to have made that

determination, the trial court had to have engaged in some sort of "factfinding involving the weighing of evidence or the exercise of discretion." (*Drayton*, *supra*, 47 Cal.App.5th at p. 980.) That is not permitted at the prima facie stage of the proceedings. (*Ibid.*) After all, there is no conclusive evidence that defendant was the actual killer. He did not admit to being the actual killer, there is no indication that the jury found him to be the actual killer, and we made no such finding in *Arnold I*. Rather, all *Arnold I* confirms is that defendant was part of a group that attacked the victim. (*Arnold I*, *supra*, B065831, pp. 2–3.) In fact, the primary witness did not see defendant with a knife and the jury found the personal use of a knife allegation not true.[4] (*Arnold I*, *supra*, B065831, pp. 6–7.) Under these circumstances, an evidentiary hearing—where the People bear the burden of proof beyond a reasonable doubt—is required.[5]

In so holding, "[w]e express no opinion about [defendant's] ultimate entitlement to relief following the hearing. (§ 1170.95, subd. (d)(2).)" (*Drayton*, *supra*, 47 Cal.App.5th at p. 983.)

All remaining arguments, including the question of whether the trial court violated defendant's constitutional right

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[4] We are not convinced by defendant's contention that because the jury found that he did not personally use a knife, he could not have been the actual killer. We previously rejected this theory. (*Arnold I*, *supra*, B065831, pp. 6–7.)

[5] As the People point out in their respondent's brief, while the facts may suggest that defendant was the actual killer or a direct aider and abettor or a major participant who acted with reckless indifference to human life, that finding cannot be made until after an evidentiary hearing.

to be present at the prima facie determination hearings, are moot.

DISPOSITION

The order denying defendant's section 1170.95 petition is reversed. On remand, the trial court is directed to issue an order to show cause (§ 1170.95, subd. (c)) and to hold an evidentiary hearing to determine whether to vacate defendant's murder conviction and resentence him (§ 1170.95, subd. (d)).

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ